SOBRI BIN HASAN

v.

R.S. RAMALINGAM

HIGH COURT, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK JC
[CIVIL APPEAL NO. 12-5-1992]
6 JANUARY 1993

APPEAL: Memorandum of Appeal - Preliminary objection by respondent that Memorandum of Appeal filed out of time - Memorandum of Appeal was included in Record of Appeal and filed within six weeks from receipt of Grounds of Judgment and Notes of Evidence - Whether Memorandum of Appeal to be filed separately within fourteen days or six weeks after receipt of Grounds of Judgment and Notes of Evidence - O. 49 r. 3A(3) Subordinate Courts Rules 1980, O. 55 r. 2 and 3 High Court Rules 1980.

WAIVER AND ESTOPPEL: Conduct and implied representation - Respondent's Counsel consented to inclusion of documents in Record of Appeal after expiry of fourteen days limited for filing Memorandum of Appeal - Whether waiver applies to rules of Court.

This was an appeal by the appellant/defendant against the award of damages by the Sessions Court, Taiping in respect of a claim arising out of a motor accident. At the start of the hearing of the appeal, the learned Counsel for the respondent/plaintiff raised a preliminary objection that the memorandum of appeal was filed out of time and consequently the appeal should be dismissed.

Held:

[1] The memorandum of appeal does not form part of the appeal record. The memorandum of appeal must be filed separately within 14 days after the service on the appellant's solicitor, of the notes of evidence and the grounds of judgment by the Subordinate Courts and served on the respondent.

[2] As the memorandum of appeal was not filed within the prescribed time, and no sufficient ground is shown for the delay (O. 55 r. 4(3) of the Rules of the High Court 1980) and as there is no application for enlargement of time to file the memorandum of appeal, the preliminary objection stands.

[3] The letter dated 10 April 1992, certainly cannot be said to be a "waiver letter". It merely states that there is no objection to the inclusion of the documents listed in the index. It does not advert to the term "waiver" at all.

[4] In the instant appeal the waiver is in relation to the Rules of the High Court 1980. The Rules of the High Court 1980 shall have effect in relation to all proceedings in the High Court, including any pending proceedings therein (O. 1 r. 2(1) Rules of the High Court 1980). The Rules of the High Court 1980 is akin to a statutory provision and cannot be defeated by estoppel. Thus, the arguments in regard to waiver and estoppel must fail.

[Appeal dismissed with costs].

Cases referred to:

Haji Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man [1990] 3 MLJ 45 ***(foll)***

Elayachee v. Woo Siu Tip [1991] 3 MLJ 108 ***(foll)***

Kuching Pharmacy Sdn. Bhd. v. FL Morison Son & Jones (M) Sdn. Bhd. [1990] 1 CLJ 508/[1990] 2 MLJ 170 ***(refd)***

Shafie bin Ahmad v. Hajjah Fatimah bte Ahmad & Ors. [1991] 3 CLJ 2217 ***(refd)***

Nothman v. Barnet LBC [1978] 1 WLR 220; [1978] 1 All ER 1243 ***(refd)***

WJ Alan & Co. Ltd. v. El Nasr Export & Import Co. [1972] 2 QB 189; [1972] 2 All ER 127 ***(refd)***

Lombard Banking Ltd. v. Central Garage and Engineering Co. [1963] 1 QB 220; [1962] 2 All ER 949 ***(refd)***

Oversea Chinese Banking Corpn. Ltd. v. Eastern Auto Co. Ltd. [1961] MLJ 300 ***(refd)***

Welch v. Nagy [1950] 1 KB 455; [1949] 2 All ER 868 ***(refd)***

Solle v. Butcher [1950] 1 KB 671; [1949] 2 All ER 1107 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 55 r. 2(1), 3
Subordinate Courts Rules 1980, O. 11 r. 1(2), O. 49 rr. 3, 3A(2), 3A(3)

For the appellant - V.T. Singam; M/s. V.T. Singam & Co.
For the respondent - L Fernandez; M/s. L. Fernandez & Co.

JUDGMENT

Hj. Abdul Malik Bin Hj. Ishak JC:

This is an appeal by the appellant/defendant against the decision of the learned Judge of the Sessions Court, Taiping, on the issue of quantum in respect of an accident claim. At the hearing of this appeal the learned Counsel for the respondent/plaintiff raised a preliminary objection to the effect that the

memorandum of appeal was filed out of time and consequently, the appeal should be dismissed. There was also no application for enlargement of time to file the memorandum of appeal, so submitted the learned Counsel for the respondent/plaintiff.

From the Court file, the following relevant events can be discerned. On 17 January 1992, the learned Judge of the Sessions Court, Taiping gave his decision. On 30 January 1992, Messrs. Yeoh Kian Teik (the then Counsel for the appellant/defendant) filed the notice of appeal and a copy thereof was served on the Counsel for the respondent/plaintiff (Messrs. L Fernandez). The Registrar of the Subordinate Courts, Taiping ('the registrar') wrote a letter dated 15 February 1992 and enclosed one copy of the 'grounds of judgment' to the then Counsel for the appellant/defendant (Messrs. Yeoh Kian Teik) and also requested for a deposit of RM350. By courier service dated 25 February 1992, Messrs. VT Singam adverted to the letter dated 15 February 1992 and informed the registrar that he had taken over the affairs of the appellant/defendant and enclosed the notice of change of solicitor together with RM4 as stamp duty and a cheque for RM350 as deposit. The letter dated 25 February 1992 showed that Messrs. VT Singam was aware that one copy of the 'grounds of judgment' was sent to Messrs. Yeoh Kian Teik, otherwise Messrs. VT Singam would not have enclosed the cheque for RM350 as requested by the registrar. By a letter of the same date (25 February 1992), a copy of the notice of change of solicitor was also extended to Messrs. L Fernandez. It must be noted that the notice of change of solicitors, which was made pursuant to O. 11 r. 1(2) of the Subordinate Courts Rules 1980 ('the SCR'), was dated 25 February 1992. The registrar sent four copies of the notes of proceedings to Messrs. VT Singam on 19 March 1992 by way of a cover letter (not using the notice in Form 141), which was also copied to Messrs. L Fernandez. On 9 April 1992, Messrs. VT Singam acknowledged receipt of the letter dated 19 March 1992. It has now been brought to my attention that Messrs. VT Singam received the letter dated 19 March 1992 on 24 March 1992. The memorandum of appeal bundled together with the record of appeal was sent on 9 April 1992 by Messrs. VT Singam and received by the High Court, Ipoh on 11 April 1992. The same memorandum of appeal, bundled together with the record of appeal, was also sent to Messrs. L Fenandez on 9 April 1992. On 17 September 1992, the registrar wrote a letter to Messrs. VT Singam and enquired as to whether he was still interested in pursuing the appeal and that the registry had yet to receive the record of appeal from him. Messrs. VT Singam replied on 24 September 1992 and stated that he had sent three copies of the record of appeal to the High Court, Ipoh on 9 April 1992 with one copy forwarded to the Counsel for the respondent/ plaintiff (Messrs. L Fernandez).

Now, learned Counsel for the respondent/ plaintiff submitted that the memorandum of appeal must be filed within 14 days after the receipt of the grounds of judgment and the notes of evidence from the Sessions Court. He submitted that he received the record of appeal on 13 April 1992 incorporating the memorandum of appeal thereby making it 12 days out of time computed from 1 April 1992 (this submission not supported by the Court file). Further, he submitted that there was no application for extension of time made in order to extend the period of 14 days.

From the recital of the relevant events extracted from the Court file, it would appear that the last date for filing the memorandum of appeal was on 1 April 1992, calculated from 19 March 1992. Even if I were to accept that the learned Counsel for the appellant/defendant had received the letter dated 19 March 1992 on 24 March 1992 (see the copy forwarded by the learned Counsel for the appellant/defendant), then the last date for filing the memorandum of appeal was on 6 April 1992 calculated from 24 March 1992. In fairness to the appellant/defendant, I would therefore accept as a fact that the last date for filing the memorandum of appeal was on 6 April 1992. In the circumstances, the record of appeal incorporating the memorandum of appeal which was received by the High Court Ipoh on 11 April 1992 was five days out of time.

There are conflicting decisions of the High Court in regard to the period of filing the memorandum of appeal. *Haji Abdul Ghani bin Kesah v. Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45 and *Elayachee v. Woo Siu Tip* [1991] 3 MLJ 108 favoured the 14 days period

whereas *Kuching Pharmacy Sdn. Bhd. v. TL Morison Son & Tones (M) Sdn. Bhd.* [1990] 2 MLJ 170 and *Shafie bin Ahmad v. Hajjah Fatimah bte Ahmad & Ors.* [1991] 3 CLJ 2217 favoured the six weeks period.

In *Haji Abdul Ghani's* case *(supra),* his Lordship Lamin J, after discussing at great lengths O. 49 r. 3A of the SCR and considering the *Kuching Pharmacy's* case *(supra)* held, *inter alia*, that by O. 55 r. 2(1) of the Rules of the High Court 1980 ('the RHC'), the memorandum of appeal must be filed within 14 days of service on the appellant's solicitor of the notice in Form 141.

In *Elayachee's* case *(supra),* his Lordship Eusoff Chin J (as he then was) preferred *Haji Abdul Ghani's* case *(supra)* and stated that:

> ... the memorandum of appeal is a necessity and must be filed within 14 days after the service on the appellant's solicitor, of the notes of evidence and the grounds of judgment by the subordinate courts.

In the *Kuching Pharmacy* case *(supra), his* Lordship Haidar J applied the purposive approach as laid down by Lord Denning in the case of *Nothman v. Barnet LBC* [1978] 1 WLR 220; [1978] 1 All ER 1243 and in order to do justice, inserted the words 'or within six weeks from the receipt of the notification referred to in O. 49 r. 3A sub-r. 3 of the Subordinate Courts Rules 1980, as the case may be', after the words 'O. 49 r. 3 sub-r (2)' in O. 55 r. 2(1) of the Rules of the High Court. Haidar J further stated that 'if those words are inserted, it means that the appellant who is represented will have six weeks to file the memorandum of appeal in line with the period prescribed under O. 49 r. 3A (3) of the Subordinate Court Rules where the appellant who is represented will have to file the record of appeal as well'.

In *Shafie Ahmad's* case *(supra), his* Lordship KC Vohrah J followed the decision of Haidar J in the *Kuching Pharmacy* case *(supra)* and said that:

> ... an appellant who is represented by solicitors must file a memorandum of appeal within six weeks from the date of receipt of the notification from the court appealed from that the certified notes of evidence and the grounds of judgment are ready under O. 49 r. 3A(3) of the Subordinate court Rules.

From the above mentioned cases, it can be deduced that the memorandum of appeal must be filed and served within the prescribed time. Otherwise, the appeal may be dismissed and in that event, I may add that any cross-appeal (O. 55 r. 3 of the Rules of the High Court) of which notice in the prescribed form has been given, can be heard.

The purpose of filing the memorandum of appeal to the High Court and the service of a copy thereof to the respondent under O. 55 r. 2 of the Rules of the High Court has been stated by his Lordship Eusoff Chin J (as he then was) in the *Elayachee's* case *(supra)* Allow me to borrow his words:

> ... it is to notify the High Court and the respondent of the grounds of appeal which the appellant proposes to advance at the hearing of the appeal. It also enables the respondent to prepare his arguments to oppose those grounds, and if necessary, to file a notice of cross-appeal for a variation of the lower court order under O. 55 r. 3 of the Rules of the High Court.

With respect, the novel approach of Haidar J in the *Kuching Pharmacy* case *(supra)* by adopting the purposive approach to cure the 'oversight' would give rise to a situation wherein the appellant who is represented by Counsel would be given more time to file his memorandum of appeal. Again, allow me to borrow the words of his Lordship Lamin J in the case of *Haji Abdul Ghani*: *(supra)*

> This gives rise to a situation that on the one hand an unrepresented appellant, be he educated or uneducated, literate or illiterate, is given 14 days from the date he is served with the notice in Form 141 (to inform that the appeal record is ready which includes notes of evidence and grounds of judgment) to file his memorandum of appeal while on the other, an appellant who is represented and therefore has the benefit of the wisdom and experience of a person learned in law is given a longer time (six weeks) to file his memorandum of appeal.

Order 49 r. 3A of the Subordinate Court Rules was inserted on 1 August 1987 vide PU(A) 67/88 to provide for a situation where the appellant is represented by a solicitor. At the same time, O. 49 r. 3 of the Subordinate Court Rules was also amended for the appellant who is not represented by a solicitor. Even the marginal

note to O. 49 r. 3 of the Subordinate Court Rules was amended to incorporate after the word 'record' the words 'where appellant is not represented or appeals as a poor person'.

Thus, under O. 49 r. 3 of the Subordinate Court Rules, the unrepresented appellant or an appellant that appeals as a poor person enjoys the services of the Subordinate Court appealed from in the way of having the requisite number of copies of the appeal record prepared for him by the Court which includes, *inter alia*, the notes of evidence and the grounds of judgment, the two essential factors, among a host of them as specified in the rule, for the preparation of the memorandum of appeal. On the other hand, by virtue of O. 49 r. 3A of the Subordinate Courts Rules in regard to the appellant who is represented by Counsel, the preparation of the appeal record includes:

(a) the relevant pleadings;
(b) the notes of evidence;
(c) the grounds of judgment, provided that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal;
(d) the decision;
(e) the notice of appeal; and
(f) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of appeal.

All these become the sole responsibility of his Counsel. Once ready, two copies of the appeal record shall be filed in the High Court 'within six weeks of the receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready' (sub-r. (3) of O. 49 r. 3A of the Subordinate Courts Rules). The effect of sub-r. (3) of O. 49 r. 3A of the Subordinate Courts Rules is this: an appellant who is represented by Counsel has six weeks to prepare the appeal record and to file it and the time is calculated from the date he is served with the notice that certified copies of the notes of evidence and the grounds of judgment are ready. It is crystal clear that the six weeks period is given to Counsel representing the appellant solely for the purpose of obtaining all the materials from (a)-(f) as set out above, in particular the certified copies of the notes of evidence and the grounds of judgment from the Court appealed from and to prepare the appeal record and then file two copies of them at the High Court. No where does it say that the six weeks period is for the *sole purpose* of filing the memorandum of appeal. That being the case, the question that arises is this: What is the period for filing the memorandum of appeal? The answer can be found in O. 55 r. 2(1) of the Rules of the High Court (vide PU(A) 462/90) which reads as follows:

> The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under O. 49, r. 2 sub-rule (4) or r. 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.

It is right to say that O. 55 r. 2(1) of the Rules of the High Court is the only rule which specifically governs the subject matter of filing a memorandum of appeal and it is applicable to two situations, *viz*:

(a) where the appellant is represented by Counsel; and
(b) where the appellant is unrepresented by Counsel or where the appellant appeals as a poor person.

It must be stressed here that the memorandum of appeal does not form part of the appeal record. The memorandum of appeal must be filed separately and served on the respondent. Once filed, the High Court will be notified of the grounds of appeal which the appellant proposes to rely upon at the hearing of the appeal. In turn, this would also enable the respondent to garner his points and prepare fully for the hearing at the High Court and if need be, to file his cross-appeal. In short, the respondent will be alerted and not be caught off guard at the hearing in the High Court. As the memorandum of appeal is not filed within the prescribed time, and no sufficient ground is shown for the delay (O. 55 r. 4(3) of the Rules of the High Court) and as there is no application for enlargement of time to file the memorandum of appeal, the preliminary objection stands. With respect, I agree with the decisions in *Haji Abdul Ghani (supra)* and *Elayachee (supra)*

I now deal with the question of waiver. It is the contention of the learned Counsel for the appellant/defendant (as I understand him correctly) that the learned Counsel for the

respondent/plaintiff right up to 10 April 1992, with knowledge that he could come to Court and raise a preliminary objection for failure of the learned Counsel for the appellant/defendant to file the memorandum of appeal within two weeks under O. 55 r. 2(1) of the Rules of the High Court, had kept quiet and had in fact agreed by letter dated 10 April 1992 to the inclusion of the documents listed in the index, that is to say, that the memorandum of appeal be bundled up with the appeal record and that by so doing, the learned Counsel for the respondent/plaintiff had impliedly waived the benefit conferred on him by the Rules of the High Court. In essence, the waiver relied upon by learned Counsel for the appellant/ defendant is the waiver of the learned Counsel for the respondent/plaintiff of his right to rely on O. 55 r. 2(1) of the Rules of the High Court particularly the failure of the learned Counsel for the appellant/defendant to file his memorandum of appeal within the two-week period.

In regard to the question of estoppel, the learned Counsel for the appellant/defendant (as I understand him correctly), applied the same argument and added that what he did, that is, filing the memorandum of appeal bundled up in the appeal record was something to which the learned Counsel for the respondent/plaintiff did not object. The conduct and the implied representation on the basis of the letter dated 10 April 1992 had made the learned Counsel for the appellant/ defendant believe that what he was doing was something which the learned Counsel for the respondent/ plaintiff did not object to and that by reason of his conduct, the learned Counsel for the appellant/defendant had forfeited his right as conferred by the Rules of the High Court.

The letter dated 10 April 1992 is reproduced below:

> M/s. V.T. Singam & Co.,
> Advocates & Solicitors,
> No. 32, 1st floor,
> Jalan Selat,
> 36000 Telok Intan. By Fax/Post
>
> Dear Sirs,
>
> Re: Ipoh High Court
> Civil Appeal No. 12-12-92
>
> We refer to your letter sent by fax on 8 April 1992. We have no objection to the inclusion of the documents listed in your index.
>
> Yours faithfully,
>
> Sgd
> (L Fernandez & Co.)

(Civil Appeal No. 12-12-92 refers to the present appeal).

I note that the above letter does not mention the waiver of O. 55 r. 2(1) of the Rules of the High Court. It does not mention that the memorandum of appeal need not be filed separately nor served separately to the respondent/plaintiff's Counsel. It does not say that the memorandum of appeal can be bundled up with the record of appeal. It does not say that the respondent/plaintiff's Counsel will forfeit his right conferred on him by the Rules of the High Court.

The term 'waiver' has been defined by Lord Denning in the case of *WJ Alan & Co. Ltd. v. El Nasr Export & Import Co.* [1972] 2 QB 189; [1972] 2 All ER 127 especially at p. 140 as follows:

> The principle of waiver is simply this: if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa Per Azioni v. Davidsons (Manchester) Ltd.* [1952] 1 Lloyd's Rep 527 at p. 539). There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them: see *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.* [1955] 2 All ER 657. But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.

In another part of his judgment (in *WJ Alan's* case *(supra)*, Lord Denning stated [at p. 140]:

> I know that it has been suggested in some quarters that there must be detriment. But I can find no support for it in the authorities cited by the judge. The nearest approach to it is the statement of Viscount Simonds in the *Tool Metal* case that the other must have been led 'to alter his position', which was adopted by Lord Hodson in *Emmanuel Ayodeji Ajayi v. RT Briscoe (Nigeria) Ltd.* [1964] 3 All ER 556 at p. 559. But that only means that he must have been led to act differently from what he otherwise would have done. And, if you study the cases in which the doctrine has been applied, you will see that all that is required is that the one should have *'acted* on the belief induced by the other party'. That is how Lord Cohen put it in the *Tool Metal* case, and is how I would put it myself.

Can the appellant/defendant in the instant appeal be said to have 'acted on the belief induced by the other party, that is, the respondent/plaintiff? Now, the authorities show that the Courts have often been ready to infer waiver from very slight evidence. (See *Lombard Banking Ltd. v. Central Garage and Engineering Co.* [1963] 1 QB 220; [1962] 2 All ER 949) The pertinent question to ask is: Is there such evidence here? The answer must surely lie with the letter dated 10 April 1992. This is the very letter that is said to have induced the appellant/defendant to believe that a waiver of the Rules of the High Court has been made. The letter certainly cannot be said to be a 'waiver letter'. It merely says that there is no objection to the inclusion of the documents listed in the index. It does not advert to the term 'waiver' at all.

WJ Alan's case *(supra)* is in regard to waiver of contractual rights. In the instant appeal, the waiver is in relation to the Rules of the High Court. The Rules of the High Court shall have effect in relation to all proceedings in the High Court, including any pending proceedings therein (O. 1 r. 2(1) of the Rules of the High Court). The Rules of the High Court is akin to a statutory provision and cannot be defeated by estoppel. In *Oversea Chinese Banking Corpn. Ltd. v. Eastern Auto Co. Ltd.* [1961] MLJ 300, Wee Chong Jin J (as he then was) relied on *Welch v. Nagy* [1950] 1 KB 455; [1949] 2 All ER 868 and *Solle v. Butcher* [1950] 1 KB 671; [1949] 2 All ER 1107 and held that the parties cannot defeat the provisions of the Control of Rent Ordinance by estoppel.

Thus, the arguments in regard to waiver and estoppel must fail.

For the reasons adumbrated above, I dismissed this appeal with costs.